No. 02-263

Supreme Court, U.S.
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In The

Supreme Court of the United States

BTA OIL PRODUCERS, ET AL.,

Petitioners,

v.

MDU RESOURCES GROUP, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The North Dakota Supreme Court

RESPONDENTS KOCH INDUSTRIES, INC. AND KOCH HYDROCARBON COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

Respondents Koch Industries Inc. and Koch Hydrocarbon Company state the following. At all relevant times, Koch Hydrocarbon Company was an unincorporated division of Koch Industries, Inc. Koch Industries, Inc. is a privately held corporation, and there is no parent or publicly held company owning 10% or more of the corporation's stock.

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STATEMENT OF THE CASE

Respondents Koch Industries, Inc. and Koch Hydrocarbon Company (collectively "Koch") owned and operated a gas processing facility in North Dakota from the late 1970's through the late 1990's. That facility was designed to aggregate and process natural gas from fields in western North Dakota and eastern Montana. The facility removed impurities from the gas stream and thereafter separated the gas stream into natural gas liquids and "residue" natural gas suitable for use in domestic and industrial gas burning applications. The gas processed by Koch was purchased from area oil and gas producers pursuant to gas purchase contracts. In general, those contracts provided that the price paid for the gas would be equal to 75% of the proceeds Koch received for selling gas liquids and residue gas from the facility, less certain applicable costs. The Petitioners are gas producers who sold gas to Koch under such contracts. Pet. App. at A-3 to A-4.

From the late 1970's to the late 1980's, Koch sold much of the residue gas from the facility to Respondents MDU Resources Group, Inc. and Williston Basin Interstate Pipeline Company (collectively "MDU") pursuant to two large "take-or-pay" type contracts. A take-or-pay gas purchase contract generally requires that the buyer either take the full amount of gas specified or pay the purchase price for any amount of gas purchased below the specified amount. In 1987, Koch sued MDU in North Dakota federal court for breaches of the two contracts based upon MDU's failure to take or pay for the specified gas quantities. Pet. App. at A-4. The district court ruled that Koch's damages must be calculated based upon the 25% share of the price Koch would have retained had MDU purchased all the gas

specified in the contracts. This ruling by the district court was subsequently affirmed by the Eighth Circuit Court of Appeals. *See Koch Hydrocarbon Co. v. MDU Resources Group, Inc.*, 988 F.2d 1529, 1547 (8th Cir. 1993). Pet. App. at A-4 to A-5. Thereafter, Koch and MDU settled the case. Pet. App. at A-5.

In 1997, the Petitioners sued MDU and Koch in state court in Stark County, North Dakota and alleged purely state-law claims against each. In essence, the Petitioners claimed that they were entitled to damages based upon MDU's breaches of its contracts with Koch. The Petitioners complained that MDU was unjustly enriched by its breaches because MDU had not paid any damages based upon the 75% share of the price, for gas not taken, which would have been attributable to the producers. The Petitioners brought claims of unjust enrichment, implied trust and civil conspiracy against MDU and brought claims of breach of contract, unjust enrichment, fraud, breach of a special relationship duty, tortious interference and civil conspiracy against Koch. Pet. App. at I-4 to I-17. At no time did the Petitioners ever bring any claim against either MDU or Koch under the U.S. Constitution. With one exception not relevant here, the Stark County District Court granted summary judgment to both MDU and Koch. Pet. App. at C-1 to C-17. Again, with one exception not relevant here, the North Dakota Supreme Court affirmed the trial court's grant of summary judgment. Pet. App. at A-1 to A-30.

In a Petition for Rehearing filed after the North Dakota Supreme Court's decision, the Petitioners *for the very first time in the entire five year proceeding* raised the Question Presented under the U.S. Constitution. The full extent of the Petitioners' present federal claim, raised for

the first time on a rehearing petition to the North Dakota Supreme Court, consists of two sentences in a single paragraph of that rehearing petition. Pet. App. at G-2. The Petition for Rehearing was denied. Pet. App. at F-1 to F-2.

REASONS FOR DENYING THE WRIT

I. THE PETITION FAILS TO IDENTIFY ANY "IMPORTANT FEDERAL QUESTION" RAISED BY THE NORTH DAKOTA SUPREME COURT'S RULING ON THE UNJUST ENRICHMENT CLAIM BROUGHT AGAINST MDU.

Supreme Court Rule 10 provides that a "petition for a writ of certiorari will be granted only for compelling reasons" and further requires that in cases involving review of state court decisions that an "important federal question" must be at issue. In a case such as this one, purporting to raise an issue under the U.S. Constitution, it has long been the position of this Court that "it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not ... substantial in character." *Zucht v. King*, 260 U.S. 174, 176 (1922).

The Petition in this case pertains solely to the claim of unjust enrichment made against MDU during the state court proceedings. The claim alleged was plainly one of state common law and was not based upon the U.S. Constitution or federal statutory or common law. The Petitioners' belated federal issue – that the decision applying North Dakota common law of unjust enrichment was unconstitutional – does not raise any "important" federal question. Instead, the Petitioners have teased theoretical federal issues from a plain vanilla state-law

claim. Their tortured effort to connect their state-law unjust enrichment claim to the U.S. Constitution must fail. For over 100 years, this Court has recognized "that not every mere allegation of a Federal question will suffice to give jurisdiction." *Equitable Life Assurance Soc'y v. Brown*, 187 U.S. 308, 311 (1902).

Indeed, in this case, the Petitioners fail to identify an important federal question because they could not even decide what constitutional issue they intended to raise before this Court. At turns, the Petitioners complain that the North Dakota Supreme Court's unjust enrichment decision violated the Petitioners' "substantive due process rights" (Pet. at 7), ran afoul of dormant commerce clause principles (Pet. at 11) and deprived the Petitioners of equal protection as a "discriminatory" ruling (Pet. at 12). In any event, the bulk of the Petition is tellingly dedicated to arguing why the North Dakota Supreme Court, in the Petitioners' view, misapplied North Dakota law on unjust enrichment. Pet. at 7-10. In short, the Petitioners have simply taken their failed arguments under North Dakota's common law of unjust enrichment to this Court. There is no viable federal issue, much less any "important" federal issue, raised by the Petition.

II. THE PETITIONERS DID NOT RAISE A FEDERAL ISSUE IN A TIMELY MANNER DURING THE STATE COURT PROCEEDINGS.

Section 1257(a) of Title 28 permits review of a state court decision "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution." There is no dispute, and the Petitioners cannot deny, that they failed to raise the federal issue in their Question Presented until they filed a Petition for Rehearing after

the North Dakota Supreme Court had issued its opinion. *See* Pet. at 8 and Pet. App. at G-2. Indeed, even in the Petition for Rehearing, the only reference to any federal issue consists of two sentences in a single paragraph in that petition. Pet. App. at G-2. Once again, Petitioners' conduct violates a principle held by this Court for nearly a century. *See Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309 (1903) (federal claim must be set up or claimed at the proper time and in the proper way); *see also Webb v. Webb*, 451 U.S. 493, 496 (1981) (petitioner failed properly to raise claim in state courts).

The Petitioners failed to raise any argument before the trial court in Stark County that a decision adverse to Petitioners on their unjust enrichment claim against MDU would violate the U.S. Constitution. It is well settled under North Dakota law that its Supreme Court will not consider arguments raised for the first time on appeal. *Steele v. Kelly*, 631 N.W.2d 167, 174 (N.D. 2001). Indeed, the North Dakota Supreme Court last year declined to entertain a constitutional argument raised by an appellant for the first time in a reply brief before that court. *Interest of B.O., V.O. and J.H.*, 631 N.W.2d 158, 167 (N.D. 2001). The instant Petition presents an even more egregious failure to raise an issue, as these Petitioners did not raise any claim under the U.S. Constitution until they filed a Petition for Rehearing before the North Dakota Supreme Court. *See McGrew*, 188 U.S. at 311 (federal claim not properly made in petition for rehearing which was denied). Thus, as the parlance of this Court, the federal issue identified in the Petition were neither pressed nor passed upon in the North Dakota state court proceedings.

III. THE PETITION INVOLVES A CLAIM AGAINST ONLY THE MDU RESPONDENTS AND DOES NOT INVOLVE ANY CLAIM BROUGHT AGAINST THE KOCH RESPONDENTS.

The Petition argues that the North Dakota Supreme Court's decision as it relates to the unjust enrichment claim brought against MDU violates the U.S. Constitution. The Petition is defective for the reasons enumerated in Parts I and II. However, if the Court were to overlook these deficiencies and to grant a Writ of Certiorari in this case, the grant should exclude the Koch Respondents. The Petition does not assert that any part of the North Dakota Supreme Court's decision relating to claims that had been brought against Koch violates the U.S. Constitution. Therefore, if a Writ is granted in this case, the Koch Respondents should not be included.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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